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IN THE

Supreme Court of the United States

_____ TERM

No. _____

JOHN K. CALHOUN, Individually and as Attorney for the ESTATE OF C. F. CALHOUN,
Petitioners

vs.

CHARLES C. HERTWIG, Trustee, Et Al,
Respondents

The Petition of John K. Calhoun, et al, for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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OPINIONS BELOW

The denial of the Extraordinary Motion for Rehearing and Intervention in the Circuit Court of Appeals on October 20, 1966, appears as Exhibit B, attached after Appendix One and Exhibit A.[1]

The denial of the Motion for Rehearing and Interven-

[1]Exhibit is a copy of the Order extending the Stay of Mandate to January 29, 1967.

tion in the Circuit Court of Appeals, filed August 9, 1966, Record Vol. II, page 772, appears as Exhibit C, attached.

The opinion and Ruling of the Circuit Court of Appeals of June 28, 1966, R. Vol. II, page 699, to which this appeal is directed, appears as Exhibit D, attached, and is published as 363 F2D 257.

The relevant pages from the Order of the District Court consummating the Plan of Reorganization setting all Creditors' claims to be less than $400,000.00, R. Vol. I, pages 371-372, appear as Exhibit E, attached.

The Judgment of the District Court finding $1,238,500.00 subject to Dea-Nap Liabilities, also before the Circuit Court on another appeal, appears in the Record as Exhibit B to Appellants' Extraordinary Motion for Rehearing, appears here as Exhibit F, attached.

The Opinion and Ruling of the District Court on June 14, 1965, R. Vol. I, pages 249-262, Exhibit G.

JURISDICTION

Notice of judgment of the Court of Appeals denying the Extraordinary Motion for Rehearing upon its judgment of June 28, 1966, was given by letter to the parties indicated in the attached Exhibit B on October 20, 1966. The jurisdiction of this Court is invoked by II U.S.C. 47 c, II U.S.C. 48, 28 U.S.C. 1954.

THE CONSTITUTIONAL QUESTIONS

1. Whether the construction given Georgia Laws 1953, page 545:

> "Obligations to pay attorney's fees upon any note . . . shall be valid and enforceable, and collective as part

of such debt, if such note . . . . be collected by or through an attorney after maturity . . ."

which takes from Secured Creditors, Class 2, not less than $10,000.000 of the payment provided for and already paid to them for their claim under the Chapter X Plan on the ground that this payment was collection attorneys' fees provided for in their secured notes, *which for this reason belongs to their attorneys and is not the property and right of these Secured Creditors, Class 2,* is illegal and contrary to the Fifth Amendment of the Constitution of the United States.

2. Whether the refusal of the Court of Appeals to allow these minors to intervene and be heard as the parties in whom the recovery of the Secured Creditors, Class 2, was then vested after its decision to divest them of their property is in violation of due process under the Fifth Amendment of the Constiution of the United States.

OTHER QUESTIONS PRESENTED

A. Whether a Court of Appeals may hold the failure of a Charter X Plan for a *solvent* Debtor to pay a secured creditor its full claim to be *fair and equitable* in face of the *Los Angeles Lumber*[2] and *Boyd*[3] decisions of this Court?

B. Whether the Court of Appeals may hold the failure of a Chapter X Plan for a *solvent* Debtor to compensate attorneys for work which raised a 35-40 per cent plan to a 89-100 per cent plan to be *fair and equitable* in face of these same decisions of this Court without being in

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[2]*Los Angeles Lumber Co. v. Case,* 308 U.S. 106; 60 S.Ct. 1 (6) *

[3]*Northern Pacific RR Co. v. Boyd,* 288 U.S. 482; 33 SCt. 554*

*Excerpts in point in Appendix One, attached.

actual conflict with the *Consolidated Motor Parts*[4] decision of the Court of Appeals for the Second Circuit.

C. Whether in face of the *Flershem*[5] and *Pepper*[6] decisions this Court of Appeals may refuse to recognize the solvency of this Debtor, either:

By refusing to recognize the Judgment of the District Court of December 18, 1964, confirmed January 26, 1965, finding all the net assets of this joint-Chapter X *subject* to Den-Nap obligations to be $1,238,500.00 . . . or . . .

By refusing to recognize the Judgment of the District Court approving the Plan of Reorganization fixing the total debt claims payable at under $40,000.00 . . . or . . .

By failing to recognize that the Consolidation of the Assets and the Subordination of the Claims of the Controlling Stockholders which make the solvency of this Debtor undeniable, are essential requirements for any fair and equitable plan in this Chapter X.

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[4]*In re: Consolidated Motor Parts, Inc.*, 82 F2D 579 (C.C.2) *

[5]*First National Bank of Cincinnati v. Flershem*, 290 U.S. 504; 54 S.Ct. 298*

[6]*Pepper v. Litton*, 308 U.S. 295; 60 S.Ct. 238*

*Excerpts in point attached in Appendix One.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. AMEND. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

One man invented a practical means of accurately engraving any tire design into a solid mold for retreading automobile and airplane tires at low cost.

The invention, the patents, and the machines embodying them, and other inventions and improvements were sold to Den-Nap Electric Mold Company of Macon, Georgia, by contract in 1946.

The greatly improved retreading molds which resulted coupled with the stronger tire bodies then being made brought forth a wide variety of safe and handsome retreads which revolutionized the industry. Retreaded tires won national consumer acceptance and a near defunct little company, Den-Nap, was raised overnight to the nation's # 2 mold producer with an annual gross of $1,000,000.00 to $2,000,000.00.

The overall compensation, ten per cent of gross, to which this inventor was entitled exceeded $1,000,00.00 under this original contract. Had the inventor been paid this sum, two million in the company earnings would have remained, one each for the two controlling stockholders. However, by various strategems on the part of the two controlling stockholders, this inventor's right was effectively reduced by roughly 50 per cent on two separate occasions so that the residual amount due to the inventor's estate in this Chapter X is a remainder of about one-fourth of the original obligation to him. Meanwhile, during the same period, the controlling stockholders have taken out over $2,000,000.00 and have still ended up with more than $3,000,000.00 in debt claims against 'their' corporation, which causes that corporation to appear to be insolvent, although the District Court actual ajudged its net assets to approximate $1,300,000.00 in Chapter X.

On the facts, this is Pepper v. Litton[7] *put into Chapter X.*

Here, the stockholders in control of a solvent corporation, before and during Chapter X, almost forced the creditors to take 40 per cent. This they did fraudulently by taking out $2,000,000.00 in cash and other assets, by taking $3,000,000.00 more in debt claims against the corporation to be later asserted as Chapter X claims, by diverting the manufacturing and sales to other plants to force a shut-down of the corporation, and then, at last putting this corporation they made to appear insolvent into Chapter X.

One creditor alone put up a fight, but all of the credi-

[7]Supra.

tors got substantially 100 per cent by the subordination of the $3,000,000.00 unpaid remainder of these fraudulent stockholder claims and the reconsolidation of the $1,300,000.00 of Den-Nap assets which resulted from this one creditnor's fight.[8]

The reorganization is over. The creditors have their money. The controlling stockholders have rung out this creditor or as a creditor and a minority stockholder and now have all the assets. But, fortunately, $56,000.00 remains in cash with the trustee[9], which may yet afford appellants their fair compensation.

On the rulings below, this is the *Flershem*[10] case with but one difference. The lower Courts are now letting the controlling stockholders cut the one fighting creditor back down to somewhere near the original 40 per cent offered. This amounts to construing the plan approved and consummated to authorize the cutback, although the language of the plan itself provides that this one creditor, being one of the two secured creditors, is to be paid 100 per cent of the contract of debt,[11] just like the other.

Cutting back this recovery of the minors in whom it is now vested is done a new and different way in two steps. First, by a refusal to reimburse their attorneys who are the appellants for the substantial expenses incurred

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[8]Creditors' Petition for Subordination, R. Vol. I, pp. 263-296, Controlling Stockholders' answer, R. Vol. I, pp. 326-341, and Bound Volume of Original Exhibits to Petition, tendered to lower Courts, Appendix Two, unattached.

[9]R. Vol. I, p. 380, last paragraph.

[10]Supra.

[11]Stockholders' Private Purchase Plan Composition, R. Vol. I, pp. 356-7-8.

and for the considerable work done in raising the plan up sixty points to 100 per cent. Secondly, by grounding this refusal on the fiction[12] that $10,000.00 of the claim has actually been paid to these appellants, their attorneys under this plan, and that $16,000.00 more, or a total of $26,000.00[13] of the recovery of these secured creditors, is a bonus to which they are not entitled, and which appellants, their lawyers, have constructively received and must consider in lieu of any additional payment on their fees to themselves.

In this way the Courts below are allowing the controlling stockholders to subtract from the one fighting creditor group's fair debt contract recovery the cost of that work which forced these controlling stockholders to add $250,000.00 to their Purchase Plan and to pay all the creditors substantially 100 per cent.

In effect, the holding is approval of a penalty to be asserted against the fighting creditor for defeating the fraudulent scheme of the controlling stockholders. The holding takes from the fighting creditor $26,000.00 and takes from appelants, their lawyers, the additional compensation they should receive for their work, expense, and accomplishments for which $45,000.00 was prayed.

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[12]This Court's own decision by Justice Brandies in *Security Mortgage Co. v. Powers,* 278 U.S. 149; 49 S.Ct. 84*, and in the Georgia cases cited in that decision hold contrary as a matter of Georgia law and Chapter X law.

[13]The total of the collection charges and the post-Chapter X interest fraction of the claim contracted for in the secured notes by this solvent debtor is due and payable to this secured creditor as a matter of right under *Consolidated Rock Products v. DuBois,* 312 U.S. 510; S.Ct. 675*.

*Excerpts in point are attached in Appendix One.

The execution of the error begins with the District Court. On July 14, 1965, it holds this work done by appellant-attorneys is not entitled to compensation as a matter of Chapter X law. Another ground given for refusing appellants' fee is bar.[14]

The District Court ruling of July 14, 1965, has already been held to be error under Chapter X by the Fifth Circuit Court of Appeals, which holds at page 9 of its present opinion:

> "... appellants did produce such benefits as would bring them within the fee allowance section. II U.S.C.A. 643 especially in light of the liberal application of the test '... to insure the vigorous representation of all security holders and the protection of minority groups ..'"

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[14]The controlling stockholders then and now vigorously contend that an equitable bar operates against this one creditor and appellants and in favor of the controlling stockholders, who are the ones who pay the fees under their Private Purchase Corposition Chapter X Plan. This District Court making the ruling had this reorganization only the last of its four years' duration. This Court may not be conscious of the inequitable acts of the controlling stockholders which would rule out any equitable bar, and this may account for its "bar" error.

However, this District Court ruling, Exhibit G, appears to definitely find as a fact that these attorneys were actually paid by a $26,000.00 bonus given to their clients under the plan. This must be the basis for the "bar"; i.e. a result of compensation already having been received by a bonus paid to their clients. Since the Court has corrected the District Court's error that no fee was earned, if this "payment" to appellants is the basis for the "bar", the now uncorrected error of the District Court which remains is identical to the now uncorrected error of the Circuit Court which holds very plainly that appellants have already been paid $10,000.00 to $26,000.00.

But, on page 10 of its opinion, the Fifth Circuit Court of Appeals in effect finds[15] that appellants lost their Chapter X fee rights when appellants attorneys accepted the plan for their estate clients during a plan hearing on the fairness and equitability of plans, because, in the sequence of the Court:

1. *Appellants and appellants' clients got $26,000 extra . . .* (this is enlarged upon in last sentence, below)

2. *'Appellants failed to speak of their Chapter X fees . . . when the matter of the settlement (composition?) was before the Court . . . and . . .'*

1. *'Appellants got $10,000 as attorneys fees . . .* (out of the $26,000 referred to in 1 above) . . .'

In short, These Chapter X rulings amount to a holding:

A. It is fair and equitable to pay this secured creditor less than 100 per cent and to earmark a portion of what this creditor is paid as belonging to its attorneys in this case; or, in the alternative . . .

B. It is fair and equitable not to compensate these attorneys for work which caused the increase from a 40 to a 100 per cent pay out in this Chapter X plan because their clients were paid in full and because they orally accepted a plan to pay their clients in full without stating they intended to follow Chapter X provisions for application for their own compensation as provided for under The Bankruptcy Act. 11 U.S.C. 643, 647.

These holdings become worth this Court's correction because in this case the Debtor is solvent as a matter of

[15]This paragraph appears at page 10 of this Court's decision, attached as Exhibit D.

law. Two unreversed Judgments of the District Court, one finding $1,238,500.00 in *net* assets subject to the debts[16], and the other approving $40,000.00 total debt liabilities payable in the Plan[17], establish that this debtor's assets cover its liabilities three times and over. Being solvent this Debtor must pay all legitimate administrative costs and all its creditors in full, unless this Court finds some new principle of law which relieves this Debtor from its contracts, and unless this Court wishes to reject the *Consolidated Motor Parts*[18] decision of the Second Circuit.

ARGUMENTS

As in the *Flershem, Boyd,* and *Pepper* cases[19], the lower Courts have not appreciated the duty of care placed upon controlling stockholders; or, the duty upon reorganization Courts to see to its performance, or even the essentiality of the reorganization Court's understanding of the true condition of each debtor in order to perform its duty to be certain that every reorganization plan approved is fair and equitable. Despite the effort of appellants and their clients to make it clear, the absence of concern and independent inquiry on the part of the lower Courts has prevented their penetration of the screen[20] built by the controlling stockholders to conceal from the Courts the fact that this debtor was solvent and is solvent for all purposes, and that this particular statu-

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[16]Exhibit F, attached.

[17]Exhibit E, R. Vol. I, p. 356, et seq.

[18]Supra.

[19]All Cited supra.

[20]Made by their fraudulent fragmentation of the going-concern and their near impenetrable contract and accounting maze.

tory *Federal Equity Reorganization* under Chapter X has been used to accomplish some grossly inequitable results.

Instead, the lower Courts completely inverted the Equitable reorganization and the Chapter X statutory duties prescribed for these parties. The result has been to relieve the controlling stockholders of the duties that the Congress and the decisions place upon them and to place unfair and unlawful duties of notice[21] and burdens of proof upon the creditors and their attorneys.

Use by the District Court of mistaken bases for its ruling[22] must be considered in light of the finding of the District Court that appellants were not helping but were hindering this Chapter X Estate by raising the 40 per cent payment plan to a 100 per cent payment plan, and that appellants are not entitled to any compensation under any circumstances.

The Fifth Circuit Court decision in this case clearly decides the matter of law in the only possible layful way: It states that the appellant-attorneys must be paid a fair fee as a matter of Chapter X law . . .

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[21]The District Court decision in effect holds the giving of notice at the plain hearing is prerequisite to compensation.

[22]The success of the controlling stockholders in the District Court decision may depend in part upon the mistaken belief in the controlling stockholders' right to an equitable bar against appellants despite Irvin v. Life of Tennessee, 204 Ga. 582.* This success may depend in part upon the mistaken belief that the multi-party composition plan as confirmed included a bilateral settlement of appellants' compensation, which for some reasosn did not have to be written into the composition plan to become effective despite the requirements of law of compositions and requirements of Chapter X plan and composition provisions.

*Excerpts in Appendix One.

But, this Circuit Court decision then goes on to find that: *actual payment of $10,000.00 to $26,000.00 has been made to appellant-attorneys.*

This factual finding is clearly erroneous factually[23] and impossible legally[23] and, constitutionally[24]. This finding may be reached only by a refusal to give effect to the plain language of the plan, which gives 100 per cent to *all* secured creditors, or a refusal to recognize the judgments of the District Court positively establishing the debtor's solvency, which requires that *all* must receive 100 per cent of their contract claims.

It is unfortunate that the Circuit Court erred in failing to recognize that this debtor is solvent under the District Judgments[25]. But, it is even more unfortunate that the Circuit Court could fail to recognize its duty to independently inquire into the actions and the plans of the controlling stockholders and to inquire into and independently understand the debtor's condition. The first of these errors caused injustice in this one case. But, the second of these errors is general in nature and unless corrected by this Court shall cause a great number of similar errors in this and all the other Circuits.

Controlling stockholders too often rebel at the duty of

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[23]Stockholders' Private Purchase Plan Composition Plan, R. Vol. I. pp. 356-7-8.

[24]In that the constitution does prolect private property.

[25]If the Circuit Court could recognize this one fact, it would see that to take from the one dissenting creditor the payment which these appellant-attorneys must receive, to avoid the initial error-of-law, is to commit a second error-of-law against the dissenting creditor and to destroy the fairness of the plan, *after its consummation.*

protection the people wish to see given to creditors. Too often ways are sought to avoid this duty as set out by the people in Congress via the Chapter X legislation. In this proceeding one new and different way to evade this duty has been discovered. Unfortunately, thus far this new evasion scheme has succeeded. This Court must once again speak out to protect and more clearly define the congressionally declared duty owed by controlling stockholders to all creditors against this new attempted encroachment.

What is the controlling stockholders' duty as now defined by the *Pepper*[26] decision, the *Los Angeles Lumber*[26], and the *Boyd*[26], *Consolidated Motor Parts*[26], and the *Flershem*[26] holdings?

Does *Pepper* say that controlling stockholders invoking the unique sovereign power of the national government to relieve and revise their contracts with creditors in reorganization must begin and end with completely undivided openness, honesty, and fairness?

Have these stockholders measured up to the *Pepper* qualification?

Do *Los Angeles* and *Boyd* establish that the controlling stockholders must first pay all administrative expenses; second, secured creditors in full, then general creditors in full, and last (but equally pro rata) all stockholders what is left?

Have these controlling stockholders met these *Los Angeles-Boyd* requirements?

Is it necessary for the controlling stockholders to pay reasonable compensation to creditors' attorneys—who succeed in blocking the controlling stockholders' efforts

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[26]Supra, excerpts attached in Appendix One.

to coerce acceptance of an unfair plan, and who then fairly induce a fair, full payment plan—as the Second Circuit Court declared in its *Consolidated Motor Parts* decision.

Has this *Consolidated Motor Parts* requirement been met here. Has it been met in actual fact, or even comparatively when $150,000.00 in fees were paid or set for the trustee and other attorneys for the 40 per cent plan, and then, after the plan was raised 60 points to 100 per cent, no compensation of any kind was payable to the appellant attorneys for their own 60 per cent additional accomplishment. (Except the $10,000 to $26,000 now supposed to be taken from the hapless minor creditors to satisfy the 'law'.)

The only and obvious answer is: NO!

Pepper, Los Angeles-Boyd, and *Consolidated* all have been ignored. They have been ignored individually. They have been ignored even more all-together, as one whole, composite standard of conduct required of controlling stockholders in reorganization.

Why? How?

There are many partial answers. But, there is only one whole answer. This one whole answer is that the *Flershem* holding was not applied. Because this holding was not applied, equity failed; injustice occurred, and injustice will recur until this Court acts to make this duty clearly applicable in all cases of this kind.

Contests between stockholders in control and minority objecting creditors are by their nature quite one-sided. The dominant stockholders begin with the legal control and the knowledge, and the power over the assets as well

as the income in their hands. This one-sidedness grows with the uniqueness, the complexity, the size, the geographic spread, the accounting obscurity[27], the operational secretiveness, and the profitability of the operations controlled by the stockholders. Each of these factors add additional weight to the already heavily weighted advantage of the stockholders in control.

On the other hand, each passing day subtracts from each creditor's interest, courage, and capacity to fight in the naturally increasingly impotent condition each creditor finds himself in as time goes by. In a short time the fainhearted creditors no longer care, after two or three, or four years, all creditor resistance is near zeo.

The Trustee is actually powerless to protect these creditors. Even in those rare cases where the creditor's attorneys are able to fight the battle through to a plan fair and equitable on its face without the trustee's help, they and the dissenting creditors are still quite vulnerable to attack from the controlling stockholders with their unlimited, tax-free resources to finance their offense. As can be seen in this case, unless they are given the informed and concerned protection of the Courts, dissenting creditors and their attorneys cannot protect themselves from campaigns for *ex post facto* rulings, which construe a fair and equitable plan into an unfair and inequitable plan, *after its consummation* just in order to make it possible to penalize them.

Each time a lower court merely *umpires* a contest between controlling stockholders and creditors, that court

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[27]If this Court would also establish the right of creditors to coherent, consolidated accounting information, in multi-corporate reorganizations this would help immeasurably.

unwittingly turns its back on *Flershem* and in effect *hands its sword to the controlling stockholders. Flershem* demands active and informed concern to forestall the unfairness and inequity which too often and too easily results without this counterforce of concern from a just and informed court to re-balance the scales in reorganization situations.

The crux of *Flershem*[28] is the standard of special care and concern for the creditors and the duty of independent inquiry into the fairness of all actions of those in control of reorganizations and their plans which *Flershem* places upon all the lower courts in reorganizations.

Flershem insists that reorganization proceedings are special and different from ordinary cases and that reorganizations call for a considerably different, higher standard of responsibility from the lower courts. Reorganizational courts are called to actively and intelligently protect all "dissenting creditors from the condition of impotency so frequently occupied by minority stockholders" and the injusticies which too often result from the weakness of their position.

Today *Flershem* is too often forgotten, as it was in this case. Today injustice comes in where the application of *Flershem* ends. But, the problem does not end with oversight. Today *Flershem* is construed to end with protection for the dissenting creditors. By ending at this point *Flershem* even fails to adequately protect these creditors themselves.

Until *Flershem* is revitalized, updated, and extended, it is a suit of armor which fails to cover the dissenting

[28]In 54 S. Ct. 298, 302 to 306; In 290 U.S. 504, 515, 517 to 523.

creditors' arms and legs by failing to protect their attorneys as they move to protect these creditors. Until the attorneys who fight the battles are protected by the *Flershem* standard of extraordinary protection from the lower Courts, dissenting creditors are still without reasonable protection from the overwhelming power of position and maneuver of stockholders in control of their corporations.

One case in a hundred may happen where the unfairness to the dissenting creditors is so obvious and so gross that the reorganization court will disregard the pressure of the majority and the dominant stockholders, without any considerable investigatory effort and expense, or legal effort on the part of the objecting creditors and their attorneys. One case in a million may find creditors with attorneys who will shoulder the expense and effort needed to protect their clients from any fraud, inequity, or unfairness which the controlling stockholders attempt, however great or difficult to bear this effort and expense may be. However, until the comprehensive protection of the reorganization court is extended to their attorneys in keeping with *Flershem,* objecting or dissenting creditors in reorganization will find themselves with no effective defense against this fraud, inequity, and unfairness in those 99 cases out of 100 where considerable investment in professional accounting and investigation and legal preparation and action is required to expose and defeat the fraud of the controlling stockholders. Until such protection from the lower Courts is extended to their attorneys in all reorganizations, the choice of objecting or dissenting creditors lies between accepting the penalty of the loss by fraud from the controlling stockholders' actions directly or accepting the penalty of the expense of

investigation and litigation to defeat the fraud: Heads the creditors loses; Tails the creditor also loses—the only open question is, how much? To preserve the protection intended for the creditors in Chapter X reorganization proceedings, another general affirmation of the policy of congress is needed in at least three areas.

The first need is for this Court's enunciation of the very basic point that a solvent debtor may not use Chapter X as a device to coerce a creditor to accept less than the full amount of his contract obligation.

The second need is for this Court to affirm the *Consolidated Motor Parts* decision of the Second Circuit, to place beyond discretion the denial of Chapter X compensation from solvent debtors for those creditors' attorneys who must expose themselves to the inevitable and determined opposition of the controlling stockholders and the trustee to their fees, by blocking the coerced acceptance of an unfair plan and by taking the action needed to make certain that the creditors do receive equity under a fair and equitable plan.

The third and greatest need is for this Court to reaffirm the doctrine of the *Flershem Case* and to extend it. That dissenting creditors need the protection of the lower Court has been established. Now we can see that their attorneys need the Court's protection just as much. In fact, in this case we can now see that the dissenting creditors need the protection of the Courts extended to their attorneys to make the protection of the Courts effective for them.

CONCLUSION

As Sorokin[1] sees through the eyes of Petrajitzsky:[2]

> "Without law we would do nothing unpleasant or hard; we would not dare to require service of other men . . . we would not have the energy (or courage, or resources) [3]to oppose a strong man . . . to fight for our rights (or our client's rights) [3] in case of their transgression."

The mere passage of time since the *Pepper*[4] and the *Boyd*[4] and the *Los Angeles Lumber*[4] statements argues for re-statement of the *duty of care owed to creditors by controlling stockholders* to enable them to face the hard and unpleasant tasks which the performance of this duty calls for in reorganization situations. The need to strengthen the authority of the *Consolidated Motor* Parts[4] decision of the Second Circuit by its inclusion in such a re-statement is another important reason for such re-statement now.

Yet, it is the need for the enlargement of the duty of concern and inquiry for the protection of reorganization creditors by the lower Court as stated in *Flershem*[4] and *Boyd*[4] which even more urgently cries out for action today. At stake is the question of whether today creditors shall be able to dare to require the performance of the duty or to find attorneys with the energy (or courage or resources) to oppose the strong, entrenched, well-financed controlling stockholders, to fight for the rights

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[1]Sorokin, P., Contemporary Sociological Theories, p. 702, 703.

[2]Petrajitzsky, L., Theory of Law, Vol. I-II, and Introduction.

[3]Added by this writer.

[4]Supra.

of their creditor clients or their own rights under Chapter X when these rights are transgressed.

This Court can and this Court should help resolve this question at this time by a clear reaffirmation of this *Flershem-Boyd* duty of concern and inquiry upon the Courts in reorganization situations. This Court's reaffirmation should include a broadening of this duty to encompass the protection of dissenting creditors' attorneys along with their clients, in order to complete the protection given to the dissenting creditors in the reorganization of a solvent corporation.

JOHN K. CALHOUN
Individually and as Attorney for
estate of C. F. Calhoun

CERTIFICATE OF SERVICE

I, John K. Calhoun, certify that a copy of this petition has been furnished by mail to counsel of record for Charles C. Hertwig; et al, Charles Cork, Paul R. Erwin, Wallace Miller, Jr., Baldwin Martin, Jr. and George Saliba, Esquires, at their respective addresses.

This 17th day of March, 1967.

/s/ JOHN K. CALHOUN